No. 79-1734

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

ROBERT PARRATT AND FRANCIS LUGENBILL,
Petitioners,

vs.

BERT TAYLOR, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF ON THE MERITS

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JURISDICTION

Although Respondent raised no objection to the jurisdiction of the Supreme Court in his brief in opposition to the Petition for Writ of Certiorari, it has subsequently become apparent that the Court may not have jurisdiction of this matter. Since this Court can consider the matter of its jurisdiction on its own motion, *see Butler v. Dexter,* 425 U.S. 262 (1976); or when raised for the first time in oral argument by the appellee, *Sibron v. New York,* 392 U.S. 40 (1968); and since it has even been said that objections to

jurisdiction can be raised at any time before this Court renders its decision, *Heirs of Nicholas Wilson v. Life & Fire Ins. Co. of New York,* 37 U.S. (12 Pet.) 140 (1838), the Respondent is raising the matter of this Court's jurisdiction in its brief on the merits, notwithstanding Sup.Ct.Rule 22.3.

The Court of Appeals for the Eighth Circuit filed its opinion in this action on January 29, 1980. (Pet.App. 10). The Petitioners' Petition for Writ of Certiorari was not filed in this action until May 1, 1980, three days after the ninety day period allowed by statute. 28 U.S.C. §2101(c) (1959).

Neither the Petitioners' petition for rehearing, filed February 19, 1980 (R. 13), nor their motion for enlargement of time, filed February 15, 1980 (R. 11) were effective to extend the time for filing the writ since they were not filed within 14 days of the court's opinion as required by Fed.R.App.P. 40(a). *See,* Sup.Ct.Rule 20.4. Nor were Petitioners entitled to an additional three days for mailing. Fed.R.App.P. 25(a); *and see Lashley v. Ford Motor Co.,* 518 F.2d 749 (5th Cir. 1975).

Respondent recognizes that the court of appeals has the power to enlarge the time in which a petition for rehearing may be filed. *See* Fed.R.App. 26(b). Such a motion can be granted on a showing of good cause if filed within the original time period for which an extension is sought. *See* Notes of Advisory Committee on Appellate Rules 1967. *See also,* Fed.R.Civ.Pro. 6(b); Sup.Ct.Rule 34; and Fed.R.Cr.P. 45. When a motion is filed out of time a showing of excusable neglect for failure to request an extension in a timely manner is normally required. Notes of Advisory Committee on Appellate Rules 1967. In this action, no such showing was made. (R. 11).

The Petitioners' belated motion for enlargement of time was apparently granted as a matter of course by the clerk of

the court of appeals. (Pet. App. 12). There is no indication that the court of appeals considered the lateness of the Petitioners' petition for rehearing which it denied on February 29, 1980.[1] (R. 15). Whether the appellate court mistakenly considered the petition or not is irrelevant for purposes of an appeal since, as a leading treatise notes, if "the motion for rehearing is filed out of time, the periods for seeking review by the Court are not effected, even if the lower court entertains and considers the motion." 12 *Moore's Federal Practice* ¶607.04[12] at 9-31 (1980). This Court has held that an untimely motion for reconsideration, even when considered and acted upon by the trial court, will not extend the time for filing a direct appeal in this Court. *Browder v. Director, Ill. Dept. of Corrections,* 434 U.S. 257 (1978). No reason exists to adopt a different rule with respect to untimely petitions for rehearing filed in the appellate court.

Petitioners' petition for writ of certiorari was filed in this Court 93 days after the court of appeals released its opinion in this matter. No timely petition for rehearing having been filed to toll the running of the 90-day period, this Court is without jurisdiction of this action and the writ of certiorari should be dismissed. *Cf. Gibson Distributing Co. v. Downtown Development Assoc. of El Paso, Inc.,* 439 U.S. 1000 (1978).

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[1]Nor can it be said that Respondent waived any objection he might have had to the granting of the extension since no answer to the petition for rehearing was requested by the court and none may be filed absent such a request. Fed.R.App.Pro. 40(a). Although Respondent was aware that Petitioners sought additional time in which to file their petition for rehearing he was unaware of the defect in the procedure used to do so until preparation for this brief began.

STATUTES INVOLVED

I. Jurisdiction

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

28 U.S.C. §2101(c) (1959).

II. Attorneys Fees

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. §1988 (Supp. 1980).

III. Statute of Limitations

Actions upon liability created by federal statute. All actions upon a liability created by a federal statute, other than a forfeiture or penalty, for which actions no period of limitations is provided in such statute shall be commenced within three years next after the cause of action shall have accrued.

§25-219 *Neb.Rev.Stat.* (Reissue 1979).

IV. Exhaustion of Remedies

Section 7, Civil Rights of Institutionalized Persons Act of 1980, Pub.L. No. 96-247, 94 Stat. 349, 352-53 appears as Appendix A to this brief.

V. Prison Administration

Sections 83-177; 185(1); & 187(1) *Neb.Rev.Stat.* (Reissue 1976) appear as Appendix B to this brief.

STATEMENT OF THE CASE

In accordance with institutional rules, the Respondent, Bert Taylor, Jr., an inmate at the Nebraska Penal and Correctional Complex ("NPCC"), ordered hobby materials by mail on April 1 and April 8, 1975. (J.A. 7, ¶¶2 & 3). Mr. Taylor was subsequently placed in the adjustment center where hobby materials were not permitted. (J.A. 7, ¶4). The hobby materials arrived at the institution mail room on April 17 and April 21, 1975. (J.A. 7, ¶5). On June 2, 1975, Mr. Taylor had been released from the adjustment center and was entitled to the possession of his hobby materials; however, he received no response to his request for the items. (J.A. 7, ¶6). Mr. Taylor subsequently contacted Robert Rybold, the grievance supervisor about the matter. [Petition for Writ of Certiorari, Appendix (hereafter "Pet.App.") 1, ¶¶1-5]. Mr. Rybolt was unable to locate the packages (Pet.App. 2, ¶5).

After various correspondence with the United States District Court for the District of Nebraska which is outlined in the court's initial order in this matter (J.A. 2), Respondent Taylor commenced this action under 42 U.S.C. §1983 (1974) by filing his handwritten *pro se* complaint on March

24, 1976. (J.A. 5). His complaint set forth the facts as outlined above and he contended "that his rights under the Fourteenth Amendment of the Constitution of the United States were violated. That he was deprived of his property and Due Process of Law." (J.A. 8, ¶ 1). He prayed for a declaration that the Petitioners' acts violated his civil rights; for compensatory damages of $1,000 for each of the Petitioners, and for punitive damages of $1,000 from the Petitioner Lugenbill. (J.A. 9, ¶ ¶ 1-3).

Petitioners filed this answer on April 16, 1976, generally admitting the allegations of Taylor's complaint but alleging that he in fact received the materials. (J.A. 12, ¶ ¶ 1-3). On April 19, 1977, counsel was appointed for Respondent. (R. 32). At the suggestion of counsel for the petitioners at a hearing on Respondent's motion for default judgment, a set of stipulated facts became the basis upon which the court ruled on a motion for summary judgment. (Pet.App. 1-3).

The district court addressed the three issues it felt were before it:[2]

1. Whether negligence by state officials is actionable under § 1983;
2. Whether penal complex officials are immune from damages; and
3. Whether the property right involved in this case is cognizable under § 1983. (Pet.App. 5).

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[2]The question of whether the Petitioners were entitled to a qualified immunity defense was neither plead nor proved by the Petitioners. (J.A. 12, 13). The question of whether the Nebraska Tort Claims Act, §81-8,209 *et. seq. Neb.Rev.Stat.* (Reissue 1976) (Pet.App. 12) provided Respondent with sufficient due process so as to satisfy the demands of the Fourteenth Amendment was never presented to the court. (J.A. 12, 13; Pet.App. 4).

Respondent's motion for summary judgment filed June 5, 1978 (J.A. 18) was sustained on October 25, 1978. (Pet.App. 4). Judgment was entered in favor of Mr. Taylor for the value of the hobby items and attorneys fees and costs on April 27, 1979. (J.A. 19).

The record does not support the Petitioners' characterization of Respondent's property as having been "lost" as stated in their brief. (Petitioners' Brief on the Merits, 3). The record does reflect that on April 17, 1975, and again on April 21, 1975, packages ordered and paid for by Respondent in conformance with NPCC regulations arrived at the complex and on each of those occasions the package receipt was signed by an individual other than the Respondent in direct violation of institutional regulations. (J.A. 7, ¶ 5; J.A. 10, Ex. A; and Pet.App. 2, ¶ ¶ 7 and 8). The record does not reflect whether the goods were lost, stolen, intentionally destroyed, unintentionally destroyed, or discarded. (Pet. App. 3, ¶ 12). At the time of the hearing on the motion for default judgment, the Assistant Attorney General represented to the court and counsel for Respondent that the whereabouts of the two individuals who had signed for Respondent's property, Mr. Kosta and Mr. Gero, was unknown.

SUMMARY OF THE ARGUMENT

In order for a plaintiff to recover under § 1983 he need establish only the violation of a constitutional right which he was subjected to by the defendant acting under color of state law. Petitioners concede that the Respondent was entitled to his property which had been placed in their hands, that they are unable to return it, and that their actions were taken under color of state law. Respondent is therefore entitled to recover for his loss under § 1983.

The purpose of § 1983 is to reach official misconduct. The legislative history indicates that Congress was concerned with compensating individuals whose rights had been violated. However, this Court has concluded that Congress did not intend to do away with the then recognized common law immunities. This Court has therefore constructed a set of qualified immunities adapted to particular situations, but always founded upon tort law principles. Underlying this system of immunities is the assumption that but for these immunities the defendants could be liable. Since these immunities are in turn based upon the reasonableness of the defendants' briefs, negligent conduct can cause defendants to lose their qualified immunity. Thus public officials who deprive individuals of their constitutional rights either unintentionally or through negligence can be held liable in some instances.

The existence of a state tort claims act does not excuse the Petitioners' actions which deprived the Respondent of his property because the act lacks numerous features necessary for due process. In addition, Congress has recently acted to allow for the staying of § 1983 actions by prisoners while their claims are referred to state administrative grievance procedures which the United States Attorney General has certified as complying with minimum standards. The creation of that remedy implies a congressional recognition of the broad spectrum of § 1983 problems, and provides a remedy to *supplement,* but *not replace* the § 1983 federal court remedy.

Finally, the record establishes that the loss of Respondent's property was a foreseeable result of the Petitioners' policies. Since the Petitioners admit receiving the Respondent's materials safely in their custody and have failed to come forward with any explanation of what kind of care they

exercised and how the property was lost or destroyed, the district court was correct in sustaining the Respondent's motion for summary judgment.

ARGUMENT

I.

INTRODUCTION

In order for a plaintiff to successfully set forth a cause of action under §1983, two—and only two—allegations are required. "First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." *Gomez v. Toledo,* 64 L.Ed.2d 572, 577 (1980). Measured against this standard, it must be concluded that Mr. Taylor has established his right to recover.

"That rights in property are basic civil rights has long been recognized." *Lynch v. Household Finance Corp.,* 405 U.S. 538, 552 (1972). Although Mr. Taylor's "rights may be diminished by the needs and exigencies of the institutional environment," *Wolff v. McDonnell,* 418 U.S. 539, 555 (1974), he "may not be deprived of life, liberty, or property without due process of law." *Id.* at 556.

Petitioners admit that Mr. Taylor was entitled to the possession of his property. They contend that they have not "deprived" Mr. Taylor of that federally protected right

within the meaning of § 1983 for five reasons.[3]

First, Petitioners contend that they cannot be held liable under § 1983 for failing to adopt and enforce procedures that would have protected Mr. Taylor's property from loss while in their custody.

Second, they contend that their actions were not the type of official conduct or misconduct which § 1983 was intended to reach.

Third, Petitioners argue that Mr. Taylor has not been deprived of a federally protected property right when there is a theoretical possibility that he might recover damages for his loss in an action against the state.

Fourth, it is urged that the Petitioners' actions were not the legal cause of Respondent's loss.[4]

The following argument will demonstrate that none of the Petitioners' contentions are well founded.

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[3]Petitioners do not contend that they were not acting under color of state law. Warden Parratt is the chief executive officer of the NPCC. §83-177 *Neb.Rev.Stat.* (Reissue 1976). Among other duties, the warden is charged with seeing that a prisoner is "returned any personal possessions taken from him upon his confinement." §83-187 *Neb.Rev. Stat.* (Reissue 1976). He is also responsible for discipline of inmates. §83-185 *Neb.Rev.Stat.* (Reissue 1976). Defendant Lugenbill is a state employee assigned to the hobby center at the NPCC. (J.A. 16, ¶2A).

[4]Petitioners' fifth contention, that Mr. Taylor's loss was *de minimus* is completely untenable. Since a plaintiff who is able to establish that his due process rights were violated is entitled to nominal damages of $1.00, even if he cannot establish actual damages, *Carey v. Piphus,* 435 U.S. 247 (1978), it is clear that Mr. Taylor who has established actual damages of $23.50, should be entitled to recover his loss. *And see Sniadach v. Family Finance Corp. of Bay View,* 395 U.S. 337 (1969) (Garnishment of $31.59 in wages without notice and an opportunity to be heard violated Due Process Clause). *See Lynch v. Household Finance Corp.,* 405 U.S. 538 (1972).

II.

LIABILITY CAN BE ESTABLISHED UNDER 42 U.S.C. §1983 FOR THE FAILURE TO ENFORCE PROCEDURES TO PROTECT CONSTITUTIONAL RIGHTS.

A. Government Policy or Custom.

The Petitioners' first contention, that the failure to enforce appropriate policies did not "deprive" Mr. Taylor of his federally protected rights within the meaning of §1983, is clearly negated by *Owen v. City of Independence,* 445 U.S. 622 (1980). In this case this Court held that a city employee, discharged without notice of reasons or a hearing in violation of his constitutional rights to procedural and substantive due process, was entitled to recover damages from the city even though he could not recover against the city's officials because they established their right to a qualified good-faith immunity. In so doing, the Court was furthering the two goals of §1983; compensation of injuries and deterrence of future unlawful conduct. The Court merely applied its holding in *Monell v. New York City Dept. of Soc. Serv.,* 436 U.S. 658 (1978) that "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury . . . the government as an entity is responsible under §1983." *Id.* at 694.

The Court in *Owen* concluded that the goal of compensating victims of unconstitutional conduct could only be furthered if cities did not enjoy the qualified immunity to which many of their officials were entitled, for otherwise "many victims of municipal malfeasance would be left

remediless if the city were also allowed to assert a good faith defense." 445 U.S. at 651, Justice Brennan, writing for the majority, went on to observe the municipal liability would also be an effective deterrent against future constitutional deprivations.

> Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. Such procedures are particularly beneficial in preventing those "systemic injuries" that result not so much from the conduct of any single individual, but from the interactive behavior of several governmental officials, each of whom may be acting in good faith.
>
> 445 U.S. at 650.

B. Unintentional Violations.

Without going so far as to say that *Owen* establishes strict liability on the part of a defendant for the violation of an individual's constitutional rights, it is clear from the Court's use of the words "malfeasance" and "unintentional infringements on constitutional rights" that the Court established that a defendant is liable when he violates an individual's constitutional rights unintentionally. Applied to the case at bar, *Owen* establishes that Petitioners can be held liable under §1983 for their failure to enforce regulations that would have protected Mr. Taylor's property.

Such a holding is consistent with this Court's oft-quoted pronouncement that §1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape,* 365 U.S. 167, 187 (1961).

Owen establishes that defendants who fail to enforce the policies designed to protect individuals' constitutional rights are liable under §1983 to individuals who are deprived of their rights because of the defendants' actions. The Court should therefore reject the Petitioners' first contention that they have not deprived Mr. Taylor of a federally protected right.

C. Similar Cases.

Other courts that have considered the issue have reached a similar conclusion.[5] In *Mingo v. Patterson,* 455 F.Supp. 1358 (D.Colo. 1978), the plaintiff alleged, among other things, that the defendants failed to return to him personal property which one of the defendants, a county sheriff, had ordered plaintiff to leave in his care. The property consisted of shirts, pants, books, letters, cups, coffee and other items the total value of which plaintiff estimated at $253.25. The court stated:

> [I]t is now clear that redress of wrongful deprivation of property by persons acting under color of state law are justicable under §1983. *Lynch v. Household Finance,* 405 U.S. 538 (1972). Moreover, a well established body of case law has developed since *Lynch* recognizing that [the] due process clause affords inmates protection against the unjustified misappropriation of personal property by prison officials.
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> 455 F.Supp. at 1363.

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[5] *Alexanian v. N.Y.S. Urban Development Corp.,* 554 F.2d 15 (5th Cir. 1977) (Allegation that wardens refused to return confiscated items to prisoner upon his release stated cause of action under §1983); *Clayton v. Shaw,* 548 F.2d 1155 (5th Cir. 1977) (Allegation that court clerk refused to return property used as evidence after trial completed states cause of action under §1983); and *Carter v. Estelle,* 519 F.2d 1136 (5th Cir. 1975) (Allegations of wrongful confiscation of prisoner's property states cause of action under §1983).

D. Petitioners' Responsibilities.

Respondent alleged and proved that the Petitioners, after taking his property into their custody, failed to follow the procedures devised in part to protect his property, and that their failure to do so deprived him of his property without due process of law. Further, the stipulated facts support the inference that Petitioner Parratt, as warden of the NPCC failed to supervise adequately the person charged with the enforcement of the minimal procedure enacted to protect property.

Petitioner Lugenbill was directly responsible for hobby material and yet Respondent's hobby material that came to the mail room of the Nebraska Penal and Correctional Complex and then to the hobby room was "lost," stolen, or otherwise disposed of on two different occasions within the span of a few days. Neither of the Petitioners offer any explanation as to why an inmate and an employee were able to receipt for, and apparently walk away with, the Respondent's property while it was within their custody and control. Their explanation of the disappearance of the Respondent's property is that there is no explanation. The action, or lack thereof, of both Petitioners, constitutes a deprivation of Respondent's property without due process of law.

III.

THE PETITIONERS' ACTIONS WERE THE TYPE OF OFFICIAL CONDUCT OR "MISCONDUCT" WHICH 42 U.S.C. § 1983 WAS DESIGNED TO GUARD AGAINST.

Section 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

Respondent pled and proved the deprivation of a right protected by the Constitution of the United States. The next inquiry thus becomes whether the deprivation is of the kind that is actionable under § 1983.

The inquiry begins with *Monroe v. Pape,* 365 U.S. 167 (1960). From the legislative history which was thoroughly discussed in *Monroe,* from *Monroe* itself, and from the cases decided by this Court since that time, one finds strong support for the proposition that when a state official's actions, pursuant to the objectives of his duties, deprive one of property without due process, his conduct is within the purview of § 1983.

A. Legislative History.

In its analysis of the legislative history underlying § 1983 in *Monroe,* this Court found no intention by the enacting Congress to limit the reach of civil remedies created by

§1983 to conduct by state officials who intentionally infringe upon federally protected rights. The Court, in reviewing the Congressional debates relating to § 1 of the Ku Klux Klan Act, the predecessor of §1983, quoted Senator Edmunds, Chairman of the Senate Committee on the Judiciary:

> The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any state law or under color of any state law, and it is merely carrying out the principles of the civil rights bill, which has since become a part of the Constitution, *viz.*, the Fourteenth Amendment.
>
> 365 U.S. at 171.

The Court later noted:

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.
>
> 365 U.S. at 180.

This Court reviewed the previous cases it had decided interpreting the phrase "under color of" laws and concluded that §1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 365 U.S. at 187. It is significant that Justice Frankfurter, the only member of the Court to dissent, agreed with the opinion of the Court that conduct actionable under §1983 was not limited by the mental state of the person alleged to have made the deprivation. Justice Frankfurter also concluded that §1983 "insofar as it creates an action for damages must be read in

light of the familiar basis of tort liability that a man is responsible for the material consequences of his acts." 365 U.S. 207.[6]

B. Qualified Immunities.

In the twenty years following *Monroe*, this Court has constructed an elaborate system of liabilities and immunities based upon the fundamental premise that a man is responsible for the natural consequences of his actions. The Court should not depart from this fundamental tenent of American law in this case.

Every decision of this Court subsequent to *Monroe* that establishes that public officials are entitled to one degree or another of immunity for their actions is based upon the underlying supposition that but for this immunity their liability could have been established. Thus in *Pierson v. Ray*, 386 U.S. 547 (1967), this Court elaborated on *Monroe's* significance for pleading and available defenses. The Court stated as follows:

In rejecting this [under color of state law] argument we

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[6]Further, Justice Frankfurter noted that the specific intent requirement established in *Screws v. United States*, 325 U.S. 91 (1944) was largely a fiction reduced "in practice to mean no more than intent without justification to bring about the circumstances which infringe . . . rights." He then observed that:

> If the courts are to enforce §1979, it is an unhappy form of judicial disapproval to surround it with doctrines which partially and unequally obstruct its operation. . . . Petitioners' allegations that respondents in fact did the acts which constituted violations of constitutional rights are sufficient.
>
> 365 U.S. at 207-08.

> in no way intimated that the defense of good faith and probable cause was foreclosed by the statute. We also held that the complaint should not be dismissed for failure to state that the officers had "a specific intent to deprive a person of a federal right," but this holding, which related to requirements of pleading, carried no implications as to which defenses would be available to the police officers. As we went on to say in the same paragraph, § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 365 U.S. 187. Part of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause.
>
> We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983.
>
> 386 U.S. at 556-57.

Pierson thus began an unbroken line of cases that this Court has decided since *Monroe* which have consistently resorted to traditional tort law concepts to fashion appropriate qualified immunities. In this instance the Court should similarly look to traditional tort law precepts in evaluating the Petitioners' conduct.

C. Varying Scope.

This Court was again called upon to elaborate upon § 1983 in *Scheuer v. Rhodes,* 416 U.S. 232 (1974). In this action, the plaintiffs alleged that the defendants had " 'intentionally, recklessly, willfully and wantonly caused an unnecessary deployment of the Ohio National Guard on the Kent State campus and, in the same manner, ordered the

Guard members to perform alleged illegal actions which resulted in the death of plaintiffs' decedents." 416 U.S. at 235. Quoting from *Pierson v. Ray, supra,* this Court noted that although the conduct of police officers is judged by the existence of good faith and probable cause, a different standard may be required in other cases.

> In the case of higher officers of the executive branch, however, the inquiry is far more complex since the range of decisions and choices—whether the formulation of policy, of legislation, of budgets, or of day-to-day decisions—is virtually infinite. . . . In short, since the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad. . . .
>
> These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all these circumstances, coupled with good-faith belief, that afford the basis for qualified immunity of executive officers for acts performed in the course of official conduct.
>
> 416 U.S. at 246-48.

The Court here constructed the defendants' immunity using the traditional tort law standard of reasonableness which is the foundation of negligence liability. The logical corollary of such an immunity is that good faith founded upon an unreasonably held belief would not exonerate the defendants.

D. No Absolute Immunity.

In *Wood v. Strickland,* 420 U.S. 308 (1975), this Court again declined to hold that public officials were absolutely immune from actions for damages under §1983. The defendants in this case had expelled the plaintiffs from school without due process. This Court reviewed its prior decisions and concluded that a two step process was appropriate in determining the extent of a defendant's immunity.

> The disagreement between the Court of Appeals and the District Court over the immunity standard in this case has been put in terms of an "objective" versus a "subjective" test of good faith. As we see it, the appropriate standard necessarily contains elements of both. The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice. To be entitled to a special exemption from the categorical remedial language of §1983 in a case in which his action violated a student's constitutional rights, a school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges. Such a standard neither imposes an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system. Any lesser standard would deny much of the promise of §1983....

> A compensatory award will be appropriate only if a school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his actions cannot be reasonably characterized as being in good faith.
>
> 420 U.S. 321-22.

In the cases subsequent to *Monroe* this Court has developed an elaborate and carefully balanced set of individually determined immunities. They are all based upon the underlying premise that but for the immunity a public official could be liable for constitutional deprivations resulting from his negligent conduct and his immunity can be lost or denied due to his negligence. This Court should continue to shape the appropriate limits of liability and immunity on a case by case basis and reject the Petitioners' contention that the possibility of liability based upon negligent conduct should be precluded in a wholesale fashion.

In the present case, a situation is before the Court wherein the Petitioners, and those under their direction and control, took custody of the Respondent's personal property at a time when Respondent was unable to take possession of it for himself. Obviously, property going into a penal institution must be examined so that the security interests of the institution may be protected, and the responsibility for the protection of this interest rests with Petitioner Parratt. See §83-177 *Neb.Rev.Stat.* (Reissue 1976). But protecting the legitimate interests of the correctional system is not the end of his responsibilities.

E. Prisoners' Rights.

A prisoner is not stripped of all of his constitutional rights when he enters the custody of the state. As this Court noted in *Wolff v. McDonnell,* 418 U.S. 439 (1974) (decided ten months before Respondent's property was improperly disposed of):

> Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a "retraction justified by the considerations underlying our penal system." [citations omitted]. But though his rights may be diminished by the needs and exigencies of the constitutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisoners of this country.... Prisoners may also claim the protections of the Due Process Clause. They may not be deprived of life, liberty or property without due process of law.
>
> 418 U.S. at 555-56.

This Court then continued to analyze "good time" and how it fits within the concept of "liberty" protected by the Due Process Clause. The Court then stated:

> This analysis as to liberty parallels the accepted due process analysis as to property. The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests.... The requirement for some kind of a hearing applies to the taking of private property.
>
> 418 U.S. 557-58.

Under the present set of facts a preloss hearing was not possible, but what was possible was that the Petitioners ensure that the regulations which had been promulgated to protect inmate property be followed. Their failure to do so resulted in Respondent's property being improperly disposed of in violation of his right to due process of law.

F. Compensation.

Further, Petitioners' assertion that §1983 "was not intended by Congress to penalize negligent conduct" misses the mark. (Petitioners' Brief on the Merits, page 4). Section 1983 was not enacted solely to punish insofar as it compensates citizens who have been deprived of constitutional rights under color of state law. It penalizes only when punitive damages are allowed and this is only in a situation where the wrongful act or conduct is accompanied by aggravating circumstances, such as malice, wantonness or willfulness. *Carey v. Piphus,* 435 U.S. 274 (1978), *Silver v. Cormier,* 529 F.2d 161 (10th Cir. 1976); *Tyrrell v. Taylor,* 394 F.Supp. 9 (E.D.Pa. 1975). Section 1983 was intended to compensate individuals deprived of constitutional rights as well as to ensure future compliance with the Constitution.

IV.

THE MERE EXISTENCE OF A POTENTIAL REMEDY UNDER STATE LAW DOES NOT REHABILITATE A TAKING OF PRIVATE PROPERTY WITHOUT DUE PROCESS OF LAW.

A. Similar Contention Rejected.

The Petitioners' third contention is that their actions under color of state law have not deprived a person of protected federal rights within the meaning of §1983 when

state law potentially provides a tort law remedy.[7] This Court has recently rejected a similar contention in *Carlson v. Green,* 446 U.S. 14 (1980), where the defendants, federal officials, contended that the existence of a right of action under the Federal Tort Claims Act ("FTCA") should preclude an implied cause of action under the Eighth Amendment. In rejecting the defendants' contention, this Court first noted that the FTCA contained no exclusive provision declaring it the substitute for an action implied under the Eighth Amendment. 446 U.S. at 19. The Court then went on to list four additional factors suggesting why an implied right of action under the Eighth Amendment would be a more effective remedy for the injuries suffered by the plaintiff than an action under the FTCA. The four reasons were as follows:

1. Since an FTCA action can be brought only against the government, it is not as an effective deterrent against wrongful conduct as a cause of action against individual defendants.
2. The FTCA does not allow the recovery of punitive damages which may be appropriate in some situations involving the deprivation of constitutional rights and which are an even more effective deterrent to future unconstitutional actions.
3. The FTCA does not provide the plaintiff with the right to a jury trial which he would have in an implied cause of action.

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[7]Petitioners raised this matter for the first time in their Petition for Rehearing before the court of appeals. (R. 13). Respondent points out that it is the Attorney General's office that is charged with the investigation, evaluation and settlement of claims made under the State Act § §81-8,212 and 81-8,218 *Neb.Rev.Stat.* (Reissue 1976). Since the Attorney General's office had actual knowledge of Respondent's claim since the service of his complaint in April of 1976, raising the applicability of the State Act for the first time four years later is disingenuous at best.

4. Liability under FTCA is dependent upon underlying state law and would make the vindication of the violation of an individual's constitutional rights dependent upon the vagaries of the laws of the several states.

446 U.S. at 20-23.

B. State Act Equally Deficient.

Each of the objections set forth in *Carlson* apply with equal force to the argument that Mr. Taylor should be relegated to recovery, if any, under the State Tort Claims Act (the "State Act") for his loss in this case. First, the State Act, like the FTCA, provides only for an action against the state, and not against individual defendants. Sections 81-8,215; 81-8,223 *Neb.Rev.Stat.* (Reissue 1976). Second, like the FTCA, the State Act contains no provision for punitive damages. Third, under the State Act there is no right to a trial by jury, and trial is to the court, just as under the FTCA. §81-8,214 *Neb.Rev.Stat.* (Reissue 1976). Fourth, the existence of a cause of action is dependent both upon underlying state tort law, §81-8,215 *Neb.Rev.Stat.* (Reissue 1976), and upon specific statutory exclusions. §81-8,219 *Neb.Rev.Stat.* (Reissue 1976). Thus, recovery under the State Act is as subject to the variations of state law as is recovery under the FTCA.[8] The reasons set forth in *Carlson*

[8]The State Act contains at least two further disadvantages for a plaintiff. It contains a two year statute of limitations, §81-8,227 *Neb.Rev.Stat.* (Reissue 1976), while federal civil rights actions in Nebraska can be brought within three years. §25-219 *Neb.Rev.Stat.* (Reissue 1979). And attorney's fees under the State Act must be paid out of a plaintiff's recovery, §81-8,228 *Neb.Rev.Stat.* (Reissue 1976), rather than being taxed as costs as allowed by 42 U.S.C. §1988.

for concluding that the existence of a possible cause of action under the FTCA did not preclude a plaintiff from suing on an implied cause of action under the Eighth Amendment are equally compelling in the present case. Further, since *Monroe,* it has been clear that:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is not barrier to the present suit in the federal court.
>
> *Monroe v. Pape,* 365 U.S. at 183.

There is no reason that this Court should change this long held rule.

C. Congressional Action.

Finally, Congress has acted to deal with the concerns expressed by the petitioners and *amici* that § 1983 actions by prison inmates are becoming unduly burdensome upon the courts and the states. On May 23, 1980, Congress passed the Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349. Section 7 of the Act (codified at 42 U.S.C. § 1997e) provides that the Attorney General of the United States shall adopt minimum standards for prison grievance procedures. States may then submit an application to the Attorney General which outlines the procedures available to prisoners with grievances in that state. If these procedures are determined to be adequate, the Attorney General shall then certify that the minimum standards have been met.

Once a state's procedures have been certified, if an adult prison inmate brings a § 1983 action regarding a grievance

that he has related to his confinement, "the court shall, if the court believes that such a requirement would be appropriate and in the interest of justice, continue such a case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy and effective administrative remedies as are available." Pub. L. No. 96-247 § 7(a)(1), 94 Stat. 352.

The legislative history of the Act indicates that Congress intended to speak to the problem of the courts' workloads and the need for administrative solutions to prison grievances.

> Another purpose of the bill is to stimulate the development and implimentations of effective administrative mechanisms for the resolution of grievances in correctional and pretrial detention facilities, and to allow a court to continue a case for a limited period of time when such an effective mechanism exists and use of it would be appropriate and in the interest of justice. The effect of H.R. 10 would be to secure basic legal and constitutional rights for institutionalized persons, and to assist in relieving the case loads of Federal courts in prisoner petitions.

H.R.Conf.Rep. No. 96-897, 96th Cong., 2nd Sess. 9-10, *reprinted in* [1980] *U.S. Code Cong. & Ad. News,* 1998, at 1999-2000.

Proposed minimum standards for inmate grievance procedures and procedures for obtaining certification of them have been promulgated by the Department of Justice. 45 Fed. Reg. 79,095 (1980) (to be codified in 40 C.F.R. Part 40). Where Congress has taken appropriate action to ameliorate the burdensome nature of prisoners' civil rights actions, it would be inappropriate for this Court to place further limits upon such actions, at least without allowing the congressional solution an adequate period to reveal its effectiveness. The Court should, therefore, reject the Peti-

tioners' third contention and conclude that the mere existence of a possibility of recovery under the State Act is not sufficient to vindicate, *ex post facto,* the violation of Mr. Taylor's federally protected property rights.

V.

THE RECORD ESTABLISHES THAT THE PETITIONERS' ACTIONS WERE THE LEGAL CAUSE OF RESPONDENT'S LOSS.

Finally, Petitioners contend that even if Mr. Taylor's complaint is held to state a cause of action under § 1983 for deprivation of federally protected rights and the existence of a possible remedy under the State Act does not rehabilitate, after the fact, the deprivation of Mr. Taylor's rights, the record does not establish that their actions were the legal cause of Mr. Taylor's loss. In other words, Petitioners contend that Respondent's loss is "too remote a consequence of the [defendants'] action to hold them responsible under the federal civil rights law." *Martinez v. California,* 444 U.S. 277, 285 (1980).

A. Nebraska Law.

Under Nebraska law, it is clear that public officials have a legal duty to "exercise reasonable care and diligence for the safekeeping of property within [their] custody." *Nash v. City of North Platte,* 205 Neb. 480, 482, 288 N.W.2d 51, 52 (1980). Furthermore, once a plaintiff has established that his property was lost or destroyed while in the custody of a

public official, the burden of going forward with the evidence to show that the loss occurred in spite of the exercise of due care shifts to the defendant. *Nash v. City of North Platte,* 198 Neb. 623, 255 N.W.2d 52 (1977). Petitioners admitted the receipt of Mr. Taylor's property. They offered no evidence as to the conditions under which it was kept or the degree of care which they exercised. The only evidence in the record establishes that notwithstanding a supposed policy to the contrary, hobby items belonging to Mr. Taylor and stored in the mail room, disappeared. Petitioners offered no explanation, plausible or otherwise, as to what happen to Mr. Taylor's property. Under these conditions, Mr. Taylor's loss was clearly a legally foreseeable result of the Petitioners' conduct and the trial court was, therefore, correct in granting Respondent's Motion for Summary Judgment.

B. Motion for Summary Judgment.

Rule 56(c) of the Federal Rules of Civil Procedure provides in part that:

> the adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if pleadings, . . . and admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The district court had before it at the time the Motion for Summary Judgment was ruled on the complaint of the Respondent alleging that he had been deprived of property without due process of law, when on two separate occasions the Petitioners allowed individuals under their directions and control to sign for property in the form of packages in

direct violation of NPCC regulations which required each inmate to sign for his own property. (J.A. 5, Complaint and attached Exhibits). The answer of the Petitioners amounts to a general denial, except that it affirmatively alleges that the two packages in question were actually delivered to the Respondent (J.A. 12, Answer). In addition to the complaint, the court had before it the stipulated testimony of Robert Rybolt, a grievance supervisor at the NPCC, in which it is conceded that the institutional policy was not followed on either of the two occasions in question.

C. Purpose of Policy.

The obvious purpose of the institutional policy of having the inmate receipt for his own property is to avoid the exact situation which occurred in this case. The inmate receipts for, and at the same time, receives physical possession of his property. The institution then has proof that the inmate has actually taken possession of his property. The policy protects the inmate's property from being lost, stolen, maliciously destroyed, converted or victimized by practical joke. In the present situation, the Respondent was in no position to protect his own property. After the property had been ordered, he had been transferred from one part of the complex, where hobby materials were permitted, to another area where hobby materials were not allowed. The record does not reflect the reason for his transfer. While it may be argued the Petitioners need not initiate any policy allowing inmates to order property, once having done so, they should be required to follow the policy created and relied upon by those like Respondent who are unable to protect their own property. Where the record reflects the fact that a prison

regulation, enacted in part ot ensure the safety of inmate property, has been violated on two occasions within a four-day span, one can certainly infer that the requisite supervision needed to ensure that the regulation is followed is not being provided.

CONCLUSION

In conclusion, Mr. Taylor had a federally protected property right in his hobby materials. Petitioners, prison employees acting under color of state law, deprived Mr. Taylor of his federally protected property rights by failing to adopt and enforce procedures that would have protected his property. They are, therefore, responsible under § 1983 for the damages which he suffered. Furthermore, the mere existence of at least a theoretical right of recovery under state tort law does not exonerate the defendants. Finally, the record establishes that the Petitioners' conduct was, as a matter of law, the legal cause of Mr. Taylor's loss.

The Court should, therefore, affirm the district court's decision, upheld by the Court of Appeals, granting the Respondent's Motion for Summary Judgment.[9] However, if the Court should overrule the decision of the lower courts, it

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[9]Respondent was allowed on award of attorney's fees by the district court. Should Respondent prevail in this Court, it is his intention to apply for such additional fees as may be appropriate. *See* 42 U.S.C. § 1988.

should remand this matter for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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APPENDIX A

EXHAUSTION OF REMEDIES.

(a)(1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.

(2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulated under subsection (b).

(b)(1) No later than one hundred eighty days after the date of enactment of this Act, the Attorney General shall, after consultation with persons, State and local agencies, and organizations with background and expertise in the area of corrections, promulgate minimum standards for the development and implementation of a plain, speedy, and effective system for the resolution of grievances of adults confined in any jail, prison, or other correctional facility. The Attorney General shall submit such proposed standards for publication in the Federal Register in accordance with section 553 of title 5, United States Code. Such standards

shall take effect thirty legislative days after publication unless, within such period, either House of Congress adopts a resolution of disapproval of such standards.

(2) The minimum standards shall provide—

(A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;

(B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;

(C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;

(D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and

(E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.

(c)(1) The Attorney General shall develop a procedure for the prompt review and certification of systems for the resolution of grievances of adults confined in any jail, prison, or other correctional facility, or pretrial detention facility, to determine if such systems, as voluntarily submitted by the various States and political subdivisions, are in substantial compliance with the minimum standards promulgated under subsection (b).

(2) The Attorney General may suspend or withdraw the certification under paragraph (1) at any time that he has reasonable cause to believe that the grievance procedure is no longer in substantial compliance with the minimum standards promulgated under subsection (b).

(d) The failure of a State to adopt or adhere to an administrative grievance procedure consistent with this section shall not constitute the basis for an action under section 3 or 5 of this Act.

Section 7, Pub. L. No. 96-247, 94 Stat. 349, 352-53 (1980) (codified at 42 U.S.C. §1997e).

APPENDIX B

Facility; chief executive; designation. There shall be in each facility a chief executive officer designated as warden or superintendent and such associated wardens or superintendents as the Director of Correctional Services may determine. The chief executive officer shall be responsible to the director for the custody, control and correctional treatment of persons committed to the department and for the general administration of the facility. Associate wardens or superintendents in each facility shall advise and be responsible to the chief executive officer of the facility and shall have such powers and duties as the chief executive officer may delegate to them in accordance with law or pursuant to the directions of the director.

§83-177 *Neb. Rev. Stat.* (Reissue 1976).

Chief executive officer; responsibilities; duties. (1) The chief executive officer of each facility shall be responsible for the discipline of those persons committed to the Department of Correctional Services who reside therein. No person shall be punished except upon the order of the chief executive officer of the facility; nor shall any punishment be imposed otherwise than in accordance with this section.

§83-185(a) *Neb. Rev. Stat.* (Reissue 1976).

Release of person committed; conditions. (1) When a person committed to the Department of Correctional Services is released from a facility, either on parole or upon final discharge, he shall be returned any personal possessions taken from him upon his confinement, and the chief execu-

tive officer of the facility shall furnish him with clothing appropriate for the season of the year, a transportation ticket to the place where he will reside, if within the continental limits of the United States or if not, the state may purchase transportation to the nearest United States border en route to his residence, and such sum of money as may be prescribed by the regulations of the Department of Correctional Services to enable him to meet his immediate needs. If at the time of his release he is too ill or feeble or otherwise unable to use public means of transportation, the chief executive officer may make special arrangements for his transportation to the place where he will reside.

§83-187(1) *Neb. Rev. Stat.* (Reissue 1976).